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No. 87-

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

KALIMA JENKINS, *et al.*,
Petitioners,

-v-

THE STATE OF MISSOURI, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2075

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated; *

*

and *

*

American Federation of Teachers, Local 691, *

*

v. *

*

The State of Missouri; Honorable John Ashcroft, Governor of the *

State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,
Arthur L. Mallory, Commissioner of Education of the State of Missouri,
Appellees,

and

School District of Kansas City, Missouri,
Appellant,

and Claude C. Perkins, Superintendent thereof.

Appeals From the United States District Court for the Western District of Missouri

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No. 87-2076

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by

her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,

Robert L. Welling, *
Donald E. West, *
Members of the Missouri *
State Board of Education, *
Arthur L. Mallory, Commissioner *
of Education of the State of *
Missouri, *
*
Appellants, *
*
and *
*
School District of Kansas City, *
Missouri, *
*
and Claude C. Perkins, *
Superintendent thereof, *
*
Appellee.

No. 87-2077

Kalima Jenkins, by her friend, *
Kamau Agyei; Carolyn Dawson, by *
her next friend, Richard Dawson; *
Tufanza A. Byrd, by her next *
friend, Teresa Byrd; Derek A. *
Dydell, by his next friend, *
Maurice Dydell; Terrance Cason, *
by his next friend, Antoria *
Cason; Jonathan Wiggins, by his *
next friend, Rosemary Jacobs *
Love; Kirk Allan Ward, by his *
next friend, Mary Ward; Robert *
M. Hall, by his next friend, *
Denise Hall; Dwayne A. *

Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellants,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,
Arthur L. Mallory, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri,

and Claude C. Perkins, Superintendent thereof. *

Submitted: October 13, 1987

Filed: January 29,,1988

Before LAY, Chief Judge, HEANEY and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The award of attorneys' fees in the Kansas City, Missouri school desegregation case has resulted in this trio of appeals. The district court[1] awarded plaintiffs' co-counsel, Arthur Benson, and the Legal Defense Fund of the NAACP (LDF) fees and expenses for services rendered in the litigation, imposed solely against the State of Missouri. The district court denied the application of the Kansas City, Missouri School District (KCMSD) for

attorneys' fees. On appeal the State of Missouri argues that the district court award compensated plaintiffs' counsel for time spent on unsuccessful claims and the fee should have been reduced because of plaintiffs' partial success; that there was error in awarding an hourly rate based upon a delay in payment factor because this is an award of interest against the State prohibited by the eleventh amendment; that 50 percent of the fee should have been imposed on KCMSD; and that the fees and expenses were unreasonable. KCMSD argues that as a party seeking to enforce the civil rights laws through litigation and as a prevailing party, it was eligible for an award of attorneys' fees. Plaintiffs argue that the district court erred in not enhancing their fee to

compensate for the risk plaintiffs' counsel assumed. The judgment of the district court is affirmed.

The school desegregation case was filed in 1977 and the history of this litigation is outlined with a broad brush in this court en banc's opinion. Jenkins v. State of Missouri, 807 F.2d 657, 661-62 (8th Cir. 1986) (en banc), cert. denied, 108 S. Ct. 70 (1987). Plaintiffs submitted a detailed application for fees under 42 U.S.C. § 1988 (1982).[2] The State filed a response cataloging specific items in the fee applications it deemed excessive, and the plaintiffs responded with an item-by-item rebuttal of the State's objections. Evidence was presented at a hearing.

The district court recognized that plaintiffs are entitled to attorneys' fees

if they succeeded on any significant issue in the litigation. It found the plaintiffs were undisputedly prevailing parties.

The district court based its fee calculation on the number of hours and amount of expenses the plaintiffs submitted. The plaintiffs had cut their total hours to delete time spent on unsuccessful interdistrict claims against federal, Kansas and suburban school district defendants. The court adopted the plaintiffs' adjusted request as the basis for the number of reasonable hours, rejecting the State's arguments for further cuts because it found that the remaining hours were either expended solely on the successful claims or were "so closely interrelated" with them "that

they cannot be separated or reduced by some arbitrary percentage." Jenkins v. Missouri, No. 77-0420-CV-W-4, slip. op. at 3 (W.D. Mo. May 11, 1987).

The district court concluded that the hours submitted by the plaintiffs after their suggested reductions for time spent on unsuccessful claims represented the time reasonably spent on this litigation, except for 3.5 of the hours requested for LDF attorney Liebman. The court also determined that the hours and expenses submitted by LDF and Benson for litigating fee requests were reasonable and allowed the expenses and a fee based on the hours submitted.

The court then turned to the determination of an hourly rate. It found

that Benson's rate would fall at the higher end of a range of $125 to $175 per hour. In doing so it considered the attorney's customary fee, his experience, reputation and ability. In addition, because the application was for services rendered from March, 1979 through June, 1986, the court deemed it essential that the hourly rate include compensation for the delay in payment. In light of delay, preclusion from other employment and the undesirability of the case, the court determined that an hourly rate of $200 per hour was reasonable.

The court determined the applicable rate for LDF's fees to be that of the locality of the litigation, Kansas City, rather than New York. It determined that a fee was appropriate for the represen-

tation by non-profit counsel and considering compensation for delay in payment awarded LDF fees at the current rather than historical rates.

The court rejected plaintiffs' claims for enhancement of the fee for quality of representation and risk of non-payment, finding that the quality of representation was included in the determination of the hourly rate. It rejected the argument that there should be upward adjustment for risk of loss because it found the plaintiffs' likelihood of success in their claim against the State was very high, the risk of non-payment slight, and the small risk of non-payment was fully reflected in the reasonable attorneys' fee calculated by the court.

The district court awarded Benson and his staff a total of $1,687,139.92 for fees and expenses rendered from March 1979 to June 30, 1986, and for the fees and expenses incurred in litigating the fee application. As Benson had received $347,332.93 of this amount, the balance due was stated to be $1,339,806.99. The court awarded LDF a total of $2,323,730.60 for fees and expenses through May 31, 1985, and $42,145.14 for litigation of the fees and expenses issue.

The court amended its order on July 14, 1987 to include an additional $37,950.00 fee award to Benson for monitoring the remedial plan in 1985-86, based on an hourly rate of $125 per hour for Benson, and $3,478.00 in expenses so incurred.

In ruling on KCMSD's fee application, the court noted that it had found in favor of KCMSD on its cross-claim against the State of Missouri, but that the cross-claim simply reiterated plaintiffs' allegations and that the same remedial plans would have been ordered even if KCMSD had not reiterated plaintiffs' allegations in its cross-claim. The district court also observed that KCMSD was adjudged liable and ordered to pay 50 percent of the costs of the remedy. See Jenkins, 807 F.2d at 684-85. It concluded that because KCMSD had violated the constitution by adopting policies which perpetuated rather than eliminated segregation, it was inappropriate to award attorneys' fees to a constitutional violator.

In determining who should pay the plaintiffs' fee, the court observed that the State of Missouri was the primary constitutional violator. Moreover, the district court noted that KCMSD had cooperated closely with the plaintiff and in fact had originally been a plaintiff before the court realigned it as a defendant in 1978. Also, KCMSD had admitted liability prior to trial, while the State had persisted in denying liability throughout the ten and a half month trial on liability issues. Accordingly, the court concluded that KCMSD would not be liable for the attorneys' fees and expenses and that the award of fees should be imposed solely against the State.

Before we consider the contentions of the parties with respect to the fee, we

reiterate the concern of the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), that the attorneys' fee issue should not result in a second major litigation and that ideally the litigants will settle the amount of the fee. Id. at 437.

I. Missouri's Appeal.

The State first argues that the district court erred in compensating the plaintiffs for time spent on the unsuccessful claims against prevailing defendants and in failing to further reduce the compensable hours due to plaintiffs' partial success as compared to the scope of the litigation as a whole. The State points out that the district court accepted the Hensley reductions made by

plaintiffs, which resulted in a fee based on roughly 85 percent of the total hours worked, in spite of plaintiffs' lack of success on their interdistrict claim.

Hensley v. Eckerhart provides the guidance for setting fee awards in cases where plaintiffs were less than totally successful:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the award of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

461 U.S. at 440.

In this case, the plaintiffs made unsuccessful claims against the State as well as the suburban, federal, and Kansas defendants for interdistrict relief. They also made successful intradistrict claims against the State and KCMSD. The district court found that the plaintiffs appropriately excluded hours that did not relate to the claims on which plaintiffs prevailed, and that the remaining hours either related solely to the successful claims or related to them as well as to unsuccessful claims and the time could not be set aside as devoted to the unsuccessful claims. This allocation of hours among the various claims is a finding of fact, which we can reverse only if clearly erroneous. See City of Riverside v. Rivera, 477 U.S. 561, 106 S. Ct. 2686,

2693 (1986); 106 S. Ct. at 2699 (Powell, J. concurring).

The State argues that reduction of the hours worked by only about 15% cannot be an adequate reduction for the time spent on claims against prevailing defendants. It is true that much of the testimony and much of the effort at trial was pointed toward relief that was not obtained. Our acquaintance with the record in this case from consideration of the appeal on the merits convinces us that many of the issues were separate in nature, but also that a substantial portion of the testimony that bore upon the unsuccessful claims was closely interrelated with the remaining claims. The parties briefed this question in detail before the trial court, explaining why they believed each

time entry was or was not compensable. Were we to fix the initial percentage reduction of the time spent by plaintiffs' counsel, we might not have arrived at the same result as the district court. However, upon review of the record, we cannot say that the district court's finding was clearly erroneous, and we may not substitute our own findings for those of the district court. See Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504 (1985).

The state argues that the district court failed to consider the degree of success obtained as required by Hensley. While the district court could have been more explicit in this respect, we are satisfied that the parties forcefully brought to the attention of the district

court the analysis required by Hensley and that the district court faithfully applied Hensley in awarding the fee. In focussing on the time relating solely to the successful claims or so closely interrelated to those claims that it could not be separated or reduced and determining a reasonable fee, the district court gave proper weight to the degree of success. See McCurry v. Tesch, 824 F.2d 638, 642 (8th Cir. 1987).

The State's proposed second reduction would amount to a double deduction by taking away hours relating to the successful claim because of unsuccessful ones, which have already been the subject of reduction. "A court should not disallow attorney hours related and necessary to successful claims." Catlett v. Missouri

Highway and Transportation Commission, 828 F.2d 1260, 1270 (8th Cir. 1987); see Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1137 (11th Cir. 1984). A second Hensley deduction is not appropriate. Accord Rogers v. Okin, 821 F.2d 22, 25, 29 (1st Cir. 1987), petition for cert. filed (Nov. 3, 1987) (district court correctly deleted only time wholly unrelated to successful claim).

The State next argues that the district court erred in considering delay in payment as a factor in setting plaintiffs' attorneys' hourly rates. The State relies on Library of Congress v. Shaw, ____ U.S., ____, 106 S. Ct. 2957 (1986), and Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987), for the proposition that the district court's consideration of delay

constituted an award of interest that violated the eleventh amendment. We are not persuaded by this argument.

Shaw involved an award of attorneys' fees in a Title VII case against the federal government, in which the district court increased the lodestar by 30% to compensate for delay in payment. The Supreme Court reversed on the grounds that the award of interest on the fees was forbidden by the "no-interest" rule, which requires a specific waiver of the federal government's sovereign immunity with regard to interest, in addition to the waiver of immunity on the underlying cause of action.

In Rogers the First Circuit analogized from Shaw to forbid an award of fees

against a state based on current hourly rates. 821 F.2d at 26-28. We cannot agree with the Rogers court that the holding in Shaw is applicable in a case involving eleventh amendment, rather than federal sovereign immunity, or to a case where the court awards current rates or considers delay as one factor in setting a compensatory fee award.

First, Shaw was expressly based on the "no interest" rule of statutory interpretation applicable in suits against the federal government. 106 S. Ct. at 2962--63. Rogers does not explain why it considers Shaw's federal sovereign immunity holding applicable in an eleventh amendment setting, and indeed Rogers acknowledges that the two areas of law carry "different standards of statutory

interpretation." 821 F.2d at 27. We see no reason to extend Shaw to the body of eleventh amendment law, which was not covered by its rationale.

Second, Rogers assumes that compensation for delay equates with prejudgment interest, and we are not satisfied that it does. Shaw leaves open a distinction between a separately stated enhancement for delay, such as the thirty percent enhancement in Shaw, which it regarded as interest, and merely considering delay as one factor in setting the hourly fee, as the district court did in this case. Judge Ginsburg dissented from the Court of Appeals decision allowing interest in Shaw, Shaw v. Library of Congress, 747 F.2d 1469, 1485-93 (D.C. Cir. 1984), arguing that "use of current rather than

the historical hourly rates in order to compensate for delay, or use of historical rates that were based on expected delay . . . would not run afoul of the no-interest rule." 106 S. Ct. at 2961 (summary by Blackmun, J.). In the Supreme Court's opinion, Justice Blackmun adverted to Judge Ginsburg's dissent without disapproval. Id.

At any rate, the eleventh amendment is not a barrier to recovery of fees against a state under section 1988, see generally Hutto v. Finney, 437 U.S. 678, 693-94 (1978), and the courts have regularly interpreted section 1988 to permit compensation for delay in the payment of fees, e.g., Sisco v. J.S. Alberici Construction Co., 733 F.2d 55, 59 n.3 (8th Cir. 1984); Grendel's Den, Inc. v.

Larkin, 749 F.2d 945, 951, 955 (1st Cir. 1984); Daly v. Hill, 790 F.2d 1071,1081 (4th Cir. 1986); Lightfoot v. Walker, 826 F.2d 516, 523 (7th Cir. 1987); Jordan v. Multnomah County, 815 F.2d 1258,1262-63 n.7 (9th Cir. 1987); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Gaines v. Dougherty County Board of Education, 775 F.2d 1565, 1572 (11th Cir. 1985). In Pennsylvania v. Delaware Valley Citizens' Council, 107 S. Ct. 3078, 3081-82, 3099 (1987), both the majority and dissenting justices seem to have approved award of delay compensation under the "typical fee-shifting statute." But the Rogers court premised its holding on its conclusion that § 1988 does not permit compensation for delay: "Our problem in the instant case is that Congress has not yet made any

statement suggesting that a § 1988 attorney's fee award should include prejudgment interest." 821 F.2d at 27. The Rogers court's decision that section 1988 does not permit delay compensation runs counter to the generally accepted view of that statute, and we will not disregard the established body of section 1988 law.

We hold that the district court properly considered delay in establishing the hourly rate.

The State also argues that the district court erred in allowing fees for paralegals and law clerks in excess of $15 per hour, which the State "suggests" is the cost to plaintiffs' attorneys of hiring the clerks and paralegals. We recognize that other courts have

approached this question differently, some viewing paralegal work as a cost to be reimbursed and others as a portion of the fee, to be given market treatment. This circuit has not resolved this question, although we have stated that "[p]aralegal fees should be allowed if reasonable and not duplicative of other legal fees." Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 817 (8th Cir. 1983). We believe that market considerations should govern, but it is not necessary to adopt an ironclad rule in this case. Suffice it to say that the district court found that $40 per hour for paralegals and $35 per hour for law clerks were reasonable fees, slip op. at 7, and we cannot say its determination was clearly erroneous.

The State raises numerous other issues dealing with granting plaintiffs'

excessive hourly billing rates and litigation expenses, particularly expert witness fees for James Anderson. While we acknowledge that some of the State's arguments have some force, we conclude that the district court's determinations in these respects were not clearly erroneous.

In its appeal against the KCMSD the State argues that the district court erred in failing to impose 50 percent of the liability for fees and expenses on KCMSD[3]

The district court justified the allocation of the fee by pointing to its earlier conclusion that the State of Missouri was the primary constitutional violator. By contrast KCMSD did not cause the unlawful segregation but simply failed, as did the State, to disestablish the dual school

system created by the State of Missouri and adopted policies which were ineffective in eliminating the unlawful segregation. Moreover, the court pointed to the fact that KCMSD had cooperated with the plaintiffs and had conceded liability prior to trial, while the State denied liability, thereby contributing to the necessity of a ten and a half month trial. Thus, in effect the district court concluded that KCMSD minimized the need for plaintiffs to incur attorneys' fees, while the State maximized the need.

The district court based its award on the defendants' relative degrees of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants. Both factors are appropriate considerations in deter-

mining who must shoulder the fees award. See Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, 474 U.S. 817, 106 S. Ct. 61 (1985), and Charles v. Coleman, 689 F.2d 774, 777 (8th Cir. 1982) (degree of liability considered in allocating responsibility for fees); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 960 (1st Cir. 1984); Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1125-26 (9th Cir. 1981) (relative time); see generally Little Rock School District v. Pulaski County Special School District No. 1, 787 F.2d 372, 374 (8th Cir.) (Arnold, J., concurring and dissenting), cert. denied, 106 S. Ct. 2926 (1986) (relative culpability and relative litigation time relevant).

The State argues that fees should be

allocated in the same percentages as liability for the costs of the substantive relief. However, the criteria for liability on the merits and for liability for fees are different--obviously, the court could not consider the amount of time spent litigating against the respective defendants when it apportioned liability for the substantive relief, but that is an appropriate consideration in apportioning liability for fees.

The district court's allocation of fees is reversible only in the event of abuse of discretion. See Adams, 657 F.2d at 1126. The reasons given by the district court in this case adequately supported its decision to place responsibility for the fees on the State.

II. KCMSD'S Appeal

We reject KCMSD's argument that it is entitled to attorneys' fees. In essence, the district court concluded that KCMSD in its cross-claim against the State simply reiterated claims made by the Jenkins class and insofar as KCMSD had been improved by the remedial plans, these plans would have been ordered as a result of plaintiffs' claims regardless of KCMSD's cross-claim. In addition, KCMSD had been adjudged a constitutional violator and the court determined it was therefore inappropriate to award it attorneys' fees. Under section 1988 a prevailing plaintiff is entitled to an award of attorneys' fees "'unless special circumstances would render such an award unjust.'" S. Rep. No. 94-1011, 94th Cong.

2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5912. Though a district court's discretion in determining when such special circumstances exist is narrowly limited, see New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 68 (1980) (title VII), the district court did not abuse its discretion in finding them here.

KCMSD cites our case of United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986), in support of its argument that the court should not have considered KCMSD's role as constitutional violator in determining that special circumstances would make an award of attorneys' fees in favor of KCMSD unjust. There, while the school districts had been held liable, the district court attempted to assess the

entire cost of consolidating against the state, based on a finding that gerrymandering had resulted from the requirements of Arkansas law mandating segregation. 791 F.2d 1575. In contrast to the situation assumed in United States v. Arkansas, in this case KCMSD was not only liable, but this court determined it was appropriate for KCMSD to pay 50% of the costs of the remedy. Jenkins, 807 F.2d at 684-86. Under these circumstances, the district court acted within its discretion in determining that it would be unjust to award KCMSD its fees against the State.

III. Plaintiffs' Appeal.

Plaintiffs argue that they are entitled to an enhancement of the fee awarded for Attorney Benson on the grounds

that he is entitled to compensation for litigating the case on a contingency basis.

The district court's order was entered before the Supreme Court handed down its decision in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, _____ U.S. _____, 107 S. Ct. 3078 (1987) (Delaware Valley II), which clarified the prerequisites for enhancement of a fee award for contingency. There was no majority opinion in Delaware Valley II, but Justice O'Connor's concurrence in judgment formed a majority for the holding that a contingency enhancement would be permissible in some circumstances, and another majority for the holding that such circumstances did not exist in the Delaware Valley II case. Justice O'Connor

stated that contingency enhancements should be awarded only on proof that the relevant market compensates for contingency cases as a class, rather than on proof of any particular risks peculiar to the case in question. 107 S. Ct. at 3090-91. Specifically, Justice O'Connor would require proof that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" Id. at 3091 (quoting plurality opinion, 107 S. Ct. at 3089).

The district court in this case denied plaintiffs a contingency enhancement based on the plaintiffs' high likelihood of success in the particular substantive case at bar; the court's criteria were not those adopted by Justice O'Connor, who

disapproved enhancement decisions based on "legal risks" peculiar to a particular case. However, plaintiffs would have fared no better under Justice O'Connor's analysis, since they failed to adduce proof that they would have faced substantial difficulties finding representation without an adjustment for contingency. While plaintiffs presented evidence that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency cases, they did not introduce any evidence about availability of counsel to plaintiffs in the absence of contingency adjustments. Several attorneys testified that they would not have taken the case at all, and one civil rights litigator testified he would not have taken the case without

regular payments. Testimony of these individuals comes short of proof that adjustment for contingency was a crucial factor in plaintiffs' ability to obtain counsel. See generally Blum v. Witoco Chemical Corp., 829 F.2d 367, 380-81 (3d Cir. 1987). On the record, we do not discover the proof required by Justice O'Connor as prerequisite for award of a contingency enhancement. See Catlett, 828 F.2d at 1271.

Plaintiffs also argue that they should receive enhancement for the risk inherent in this particular case in accordance with the Delaware Valley II views of Justice Blackmun. However, Justice O'Connor disapproved Justice Blackmun's suggestion of enhancement for extraordinary legal risk in a particular case, 107 S. Ct. at

3090, and therefore Justice Blackmun's views did not command a majority of the Court. Furthermore, the district court specifically held that this case did not involve extraordinary risk of failure and this finding is not clearly erroneous. Therefore, even under Justice Blackmun's views, the plaintiffs are not entitled to a contingency enhancement for extraordinary risk in this case. The judgment of the district court is affirmed in all respects.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KALIMA JENKINS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No.77-0420-CV-W-4
	)	
STATE OF MISSOURI, et al.	)	
	)	
Defendants.	)	

ORDER

Several motions for awards of attorney's fees and expenses are presently before the Court. Plaintiffs' co-counsel, Arthur Benson, has moved for $3,310,587.00 in fees and expenses for services rendered by him and his staff through June 30, 1986. The Court will award Mr. Benson and his staff $1,614,437.43 for these services. Having previously received $347,332.93 of this amount, the balance due Mr. Benson for these services is

$1,267,104.50. In addition, Benson has requested $72,702.49 in fees and expenses incurred in litigating his fee application. The Court will award this amount. The Legal Defense Fund (LDF), co-counsel for the plaintiffs in this case, moved the Court for $3,170,600.20 in fees and expenses for services rendered through May 31, 1985. The Court will award the LDF $2,323,730.60 for these services. In addition, the LDF seeks $65,411.64 in fees and expenses incurred in pursuing its fee application. The Court will award the LDF $42,145.14 for such services. The State of Missouri defendants will be solely liable for the fees and expenses awarded by the Court. Co-defendant KCMSD has moved the Court for $1,298,198.70 in attorney's fees and litigation expenses for services

rendered through June 30, 1986. This motion will be denied. Intervenor Kansas City Missouri Federation of Teachers Local 691 moved the Court for $62,169.37 in attorney's fees and expenses incurred through March 1, 1987. This motion will be denied.

BENSON AND STAFF

Pursuant to 42 U.S.C. § 1988, the Court may allow the prevailing parties in this suit a reasonable fee as part of the costs. However, the plaintiffs in this case may only be considered prevailing parties for attorney's fees purposes if they succeeded on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing the suit. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), quoting Nadeau v. Helgemoe,

581 F.2d 275, 278-79 (1st Cir. 1978). The plaintiffs in this action are undisputedly "prevailing parties" because this Court found in favor of the plaintiffs on their liability claims against the State of Missouri defendants and the KCMSD. Jenkins v. State of Missouri, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984).

The first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blum v. Stenson, 465 U.S. 886, 888 (1984). Mr. Benson acknowledges that under Hensley v. Eckerhart, 461 U.S. 424 (1983), he and his staff cannot receive compensation for all their time spent on this litigation since the plaintiffs were not successful in their

claims against the suburban school districts, the Kansas defendants, and the federal defendants. Accordingly, Mr. Benson excluded from the total time expended by him and his staff approximately 353 hours which he claims was clearly allocable to work done on the unsuccessful claims against these other defendants. The State argues that Benson and his staff failed to exclude additional hours that were expended solely on the unsuccessful claims. Contrary to the contentions of the State of Missouri, the Court finds that the specific exclusions made by Benson and his staff accurately represent the time allocable to unsuccessful claims in the litigation, and which was "distinct in all respects" from time spent on their successful claims. Hensley v. Eckerhart, 461 U.S. at 440.

The State also argues that the remaining time should be reduced by 50% because the plaintiffs were unsuccessful on their claim of interdistrict liability against the State and various other defendants. The Court finds that these remaining hours either related solely to the successful claims made by the plaintiffs against the State and the KCMSD, or were so closely interrelated among the remaining claims that they cannot be separated or reduced by some arbitrary percentage.

Finally, the State also requests an additional reduction of 5% for alleged duplication of effort. The State argues that because the plaintiffs utilized thirteen attorneys and numerous staff personnel in this case that there was

"inevitably" some duplication of effort. Having examined the time records submitted by Benson and his staff, the Court finds no such duplication. Retention of numerous attorneys and a large staff in this lengthy and complicated school desegregation case is certainly understandable and is not in itself a ground for reducing the hours claimed. Johnson University College of the University of Alabama in Birmingham, 706 F.2d 1205, 1205 (11th Cir. 1983).

For the reasons stated, the Court finds the hours submitted by Mr. Benson and his staff represent the time reasonably expended on this litigation.

The next step in arriving at reasonable attorney's fees is the determination of a reasonable hourly rate. In making

such a determination, the Court has carefully considered the twelve factors enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) that have been adopted by the Eighth Circuit. E.g., Hardman v. Board of Education of Dollarway, Arkansas, 714 F.2d 823, 825 (8th Cir. 1983). Among these factors are the customary fee of the attorney and his experience, reputation and ability. The Court finds that Mr. Benson does not regularly charge an hourly rate in his civil rights practice. Therefore, the Court must consider the current Kansas City, Missouri hourly rate for attorneys with the litigation experience and expertise comparable to that of Mr. Benson.

It is undisputed that Mr. Benson is an experienced trial attorney who is widely

recognized as a highly qualified civil rights attorney in the Kansas City, Missouri area. Based on the evidence presented to the Court, the Court finds that the hourly rates for Kansas City, Missouri attorneys with litigation experience and expertise comparable to that of Mr. Benson range from $125.00 to $175.00 per hour. The Court finds that Mr. Benson's rate would fall at the higher end of this range based upon his expertise in the area of civil rights.

Two additional Johnson factors are particularly applicable in this case, i.e., the preclusion of other employment by the attorney due to acceptance of a case, and the undesirability of a case. The Court finds that from early 1983 until the end of 1985 Benson devoted nearly all

of his professional time to this case and was thereby precluded from accepting other employment. Similarly, Benson's staff was also precluded from other employment for a period of at least one year while working full time on this litigation.

The undesirability of this case should also be considered in determining Benson's reasonable hourly fee. Undeniably, this case has been very unpopular with many Missouri citizens as evidenced by various statements, editorials, articles and letters from parents, taxpayers and state officials.

In addition, the Court has considered delay in payment, a factor not listed in Johnson, in determining a reasonable attorney's fee for Benson's services. Mr. Benson's application is for services

rendered from March, 1979 through June 30, 1986. It is essential that his hourly rate include compensation for the delay in payment. Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981).

Accordingly, having carefully considered the twelve factors set forth in Johnson, and the additional factor of delay in payment, the Court finds that a reasonable hourly rate for Mr. Benson's services from 1979 through June 30, 1986, is $200.00 per hour. This rate, multiplied by the number of hours reasonably expended by Mr. Benson on the litigation, results in an attorney's fee of $1,004,160.00. The Court will award Mr. Benson this amount for attorney's fees for services rendered through June 30, 1986.

Mr. Benson had requested an hourly rate of $125.00 an hour which when multiplied by his reasonable hours expended totals $627,600.00. However, he also requested additional awards of $370,042.00 for "quality of representation" and $1,135,800.00 for the "risk of nonpayment," creating a total fee request for his services of approximately $2.1 Million Dollars.

The Court finds that Benson's request is improper because under Blum v. Stenson, 465 U.S. 888, 898-900 (1984) the "quality of representation," along with the "novelty and complexity of the issues," "the special skill and expertise of counsel," and the "results obtained" from the litigation are presumably fully reflected in the product of the reasonable

hours and a reasonably hourly rate, and thus cannot serve as an independent as is for increasing the basic fee award. In the present case, the quality of Benson's representation as well as the other factors mentioned above, are fully reflected in the $1,004,160.00 fee calculated by the Court.

The Court is aware that an upward adjustment is permissible in the rare case where fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rate charged and that the success was exceptional. Blum v. Stenson, 465 U.S. at 899. However, while Mr. Benson certainly provided quality representation in this case, the Court does not find that

this is the "rare case" which warrants an upward adjustment.

The question of upward adjustment based on the risk of loss, or as described by the plaintiffs, risk of nonpayment, was left open in Blum v. Stenson, supra. However, in Pennsylvania v. Delaware Valley Citizens Council for Clean Air, No. 85-5, slip op. at 20-21 (July 2, 1986), the Supreme Court reset the case for argument on that particular issue. To date, no such opinion has been rendered. Notwithstanding, the Court finds that the plaintiffs' likelihood of success in their claim against the State of Missouri defendants was very high, and thus Benson's risk of nonpayment very slight, because the State had mandated segregated schools for black and white children prior

to 1954 and had failed to take any affirmative steps to eliminate the unlawful segregation after 1954. This small risk of nonpayment is fully reflected in the reasonable attorney's fee calculated by the Court.

Benson also requests a fee award for the services of four attorneys whom he employed to assist him in the litigation of this case. Two of these attorneys, Ms. Burkdoll and Ms. Goering, were associates of Mr. Benson and billed 97% of the hours submitted by these four attorneys on the fee application. Mr. Benson requests an hourly rate of $80.00 per hour for Ms. Burkdoll and Ms. Goering. The evidence presented to the Court establishes that current Kansas City, Missouri hourly rates for associates with experience and

expertise comparable to Ms. Burkdoll and Ms. Goering range from $60.00 to $95.00 per hour. After careful consideration, the Court finds that $80.00 per hour is a reasonable hourly rate for their services. The Court notes that the $80.00 per hour rate is approximately $15 to $20 higher than the average hourly rate for Kansas City associates in 1982-84, the years in which Ms. Burkdoll and Ms. Goering compiled their hours. However, the differential is necessary to compensate Mr. Benson for the delay in payment. Accordingly, the Court will award Mr. Benson a total of $304,348.00 in fees for services rendered by Ms. Burkdoll and Ms. Goering from 1982 to 1984.

Benson also requested that he be awarded enhancements of $319,328 and

$287,912 for the services of Ms. Burkdoll and Ms. Goering for the risk of non-payment. As previously stated, the risk of nonpayment was very small and is fully reflected in the $80.00 per hour rate found to be reasonable by the Court.

The remaining two attorneys employed by Mr. Benson, Mr. Routman and Mr. Thomas, collectively compiled 89 hours from 1981 through 1983. At the time they began assisting Mr. Benson in this litigation, Mr. Routman had ten years of legal experience and Mr. Thomas five. Both are presently partners in Kansas City, Missouri law firms. After careful consideration, the Court finds that the hourly rate of $90.00 for Mr. Routman and $85.00 per hour for Mr. Thomas requested in the fee application are reasonable for

the Kansas City, Missouri area. Therefore, the Court will award Mr. Benson $7,663.00 in attorney's fees for the services of Mr. Routman and Mr. Thomas.

Mr. Benson also requested an enhancement of the above award for the risk of nonpayment. Again, the Court finds that such a risk is very small and is fully reflected in the hourly rates calculated by the Court.

Mr. Benson also employed seven paralegals and four law clerks for whom he requests fees. The evidence presented to the Court indicates that the current Kansas City hourly rates is $40.00 an hour for paralegals and $35.00 for law clerks, the rates requested by Mr. Benson. Therefore, the Court finds that the requested rates are reasonable for the

services rendered and will award Mr. Benson $225,084.50 for paralegal and law clerk fees. Furthermore, the Court notes that it has adequately compensated Mr. Benson for the delay in payment by calculating this award based upon the current, rather than the historical, hourly rates.

In addition, Mr. Benson requests $73,182.43 in litigation expenses that he has personally incurred from 1979 to June 30, 1986. The Court has carefully reviewed these expenditures and finds them necessary and reasonable in cost. Therefore, the Court will award the requested amount.

Mr. Benson also seeks $72,702.49 in fees and expenses incurred in preparing and litigating his fee application. Such fees and expenses are compensable under 42

U.S.C. § 1988. Doulin v. White, 549 F.Supp. 152, 159 (E.D. Ark. 1982). Mr. Benson was represented in his fee application by Mr. Russell Lovell, a professor of law at Drake University. Mr. Lovell is a regular lecturer on civil rights litigation, including attorney's fees. Prior to joining the law faculty at Drake University, Mr. Lovell practiced law for five years and served as counsel of record in approximately twenty federal court civil rights cases. Based upon the skill and experience of Mr. Lovell and type of work involved, the Court finds that $125.00 per hour is a reasonable Kansas City, Missouri hourly rate for preparing and litigating this fee application. The Court finds that the time records submitted by Mr. Lovell represent hours

reasonably expended on the fee application. Therefore, the Court will award $47,387.50 for services rendered by Mr. Lovell.

Mr. Benson requests a fee of $10,125.00 for his services in litigation of his fee application. Having reviewed the time records submitted by Mr. Benson, the Court finds that the 81 hours listed represent time that was reasonably expended on the litigation. In addition, the Court finds that the $125.00 hourly rate requested by Mr. Benson is a reasonable rate for the work performed. Therefore, the Court will award Mr. Benson the amount requested.

In addition, Mr. Lovell and Mr. Benson collectively employed three paralegals and two law clerks to assist in the prepara-

tion of the fee application. The Court has reviewed the hours submitted by these individuals and finds them reasonable. Furthermore, the rates requested, $40.00 per hour for paralegals and $35.00 per hour for law clerks, are certainly reasonable rates for the Kansas City area. Therefore, the Court will award the $7,865.00 in fees requested for these staff members.

Finally, Mr. Benson requests $7,324.49 for expenses incurred in litigation of this fee application. Having reviewed the records submitted, the Court finds that these expenditures were necessary and their cost reasonable and will award the amount requested.

In summation, the Court finds that Mr. Benson and his staff are entitled to a

total award of $1,687,139.92 in fees and expenses for services rendered from 1979 to June 30, 1986, and for fees and expenses incurred in litigating his fee application. To date, Mr. Benson has received $347,332.93 of this amount, leaving a balance due of $1,339,806.99.

THE LEGAL DEFENSE FUND

The Court finds that this highly complex case required resources far beyond those available to Mr. Benson. Therefore, it was necessary for Mr. Benson to obtain the assistance of an organization such as the LDF. The LDF entered the case in March, 1982 as co-counsel for the plaintiffs and is now requesting an award of $3,170,600.20 in fees and expenses for services rendered through May, 1985.

Approximately $2.5 Million of the total amount requested by the LDF

represents fees of attorneys, paralegals and law clerks. As stated previously, the first step determining a reasonable fee is to multiply the number of hours reasonably expended on the litigation times a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886, 888 (1984). Regarding the hours submitted by the LDF, the Court finds that the LDF properly excluded the time that was clearly allocable to work done on the unsuccessful claims pursuant to Hensley v. Eckerhart, 461 U.S. 424 (1983). The Court finds that the remaining hours, except for 3.5 hours submitted by Mr. Liebman for a 12-21-83 flight from Kansas City to New Mexico, were reasonably expended on the litigation, and are deserving of compensation.

In determining a reasonable hourly rate for the services of the various LDF

attorneys and support personnel, it is noteworthy that such fees are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. Blum v. Stenson, 465 U.S. at 895. The "relevant community" is the "general locality in which the litigation takes place." International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 255, 1275 (8th Cir. 1980). Therefore, the hourly rates to be awarded the attorneys and staff of the New York based LDF will be determined according to Kansas City, Missouri rates.

Seven of the LDF staff attorneys assisted Mr. Benson in the litigation of this case from March 1982 to May 1985. In

determining a reasonable hourly rate for each attorney's services, the Court has considered the twelve factors in Johnson v. Georgia Highway Express, Inc., 488 F.2d at 717-19. The LDF attorneys are salaried and do not charge a customary fee. Therefore, the Court must judge the experience, reputation and ability of the individual attorneys and determine a reasonable hourly rate for a Kansas City, Missouri attorney with similar experience and expertise. Based upon the evidence presented, the Court finds that the current Kansas City, Missouri hourly rate for attorneys with litigation experience and expertise comparable to that of LDF attorneys Liebman, Johnston, and Lief range from $125 to $175 per hour. In addition, the Court finds that these

attorneys are entitled to compensation for delay in payment. Therefore, the Court will award the LDF attorney's fees at the current, rather than historical, rates. Accordingly, the Court finds that the $160.00 requested by Mr. Liebman is a reasonable hourly rate and will award the LDF $650,688.00 for his services rendered through May of 1985. Similarly, the Court finds that $175.00 per hour is a reasonable hourly rate for the services of Mr. Johnson and Ms. Lief and will award fees of $62,002.50 and $122,447.50 respectively for their services.

The Court finds that the experience and expertise of attorneys Shaw, Fins, Winter and Hair at the time of their involvement in this case is comparable to that of associates with five or fewer

years experience. The current Kansas City hourly rate for such associates ranges from $60.00 to $95.00 per hour. Therefore, the Court finds that a reasonable hourly rate for the services of Mr. Shaw, Mr. Winter, Ms. Hair and Ms. Fins is $95.00 per hour and the Court will award the LDF a total of $384,617.00 for their services.

LDF had requested rates higher than those awarded by the Court claiming that the complexity and scope of the litigation prompted a hiring freeze and precluded it from accepting other cases for which it would receive payment sooner. The Court considered this factor, but finds that during this litigation the LDF employed additional attorneys who were not involved in this litigation and were available for work on other cases.

The LDF also requested the Court to award it a contingency enhancement of $688,874.30. As stated previously, the Court finds that the plaintiffs' risk of loss, and thus the LDF's risk of nonpayment, was very slight and is fully reflected in the reasonable fees calculated by the Court.

In addition, the LDF requests an award for the services of numerous paralegals, law clerks and recent law graduates. Based upon the evidence presented, the Court finds that the requested rates of $50.00 an hour for recent law graduates, $40.00 for paralegals, and $35.00 an hour for law clerks are comparable to the current Kansas City, Missouri rates for these services. Therefore, the Court will award the LDF $431,337.75 in fees for the

services rendered from March, 1982 to May 1985.

In addition, the LDF requests $672,637.85 in litigation expenses. The Court has carefully reviewed these expenditures and finds that they were necessary and their cost reasonable. Accordingly, the Court will award the LDF the requested amount.

The LDF also requested an award of $65,411.64 in attorney's fees and expenses incurred in the preparation and litigation of their fee application. The Court has reviewed the time records submitted by the four attorneys who represented the LDF in their fee application and finds that they contain only those hours that were reasonably expended on the litigation. However, the Court finds that the New York

rates requested by these attorneys, ranging from $160.00 to $330.00 per hour, are excessive and do not reflect a reasonable hourly rate in the Kansas City, Missouri area for similar work. As the Court found in considering Mr. Benson's request for attorney's fees incurred in litigating his fee application, $125.00 per hour is a reasonable hourly rate for such work in the Kansas City, Missouri area. Thus, the Court will award the LDF $29,050.00 in fees for services rendered in litigating its fee application.

The LDF also requests $ 11,441.33 for expenses incurred in litigating its fee application. Having carefully reviewed these expenditures, the Court finds that they were necessary and their cost reasonable and will award the amount requested.

KCMSD

KCMSD requests an award of $1,298,198.70 for attorney's fees and expenses for work performed from March, 1977 through June, 1986. The issue before the Court is whether the Kansas City, Missouri school district is a "prevailing party" within the meaning of 42 U.S.C. § 1988.

A party may be considered a prevailing party for attorney's fees purposes if they "succeed on any significant issue in the litigation which achieves some of the benefit the party sought in bringing suit." Hensley v. Eckerhart, 461 U.S. at 433. For purpose of analysis of the attorney's fees issues, the "notion of 'prevailing party' is to be interpreted in a practical, not formal, manner."

Northcross v. Board of Education, 611 F.2d 624, 636 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

This Court did find in favor of the defendant KCMSD on its crossclaim against the State of Missouri defendants. Jenkins v. State of Missouri, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984). However, in its crossclaim, the KCMSD simply reiterated the allegations of the plaintiffs that the State of Missouri had failed to take action to dismantle its prior dual school system, and had acted to perpetuate the segregation. This Court found for the plaintiffs on this same claim against the state defendants. Jenkins v. State of Missouri, 593 F.Supp. at 1505. While the KCMSD has certainly been improved by the remedial plans ordered by the Court after

assessing liability against the State and the KCMSD, it is the plaintiffs, the victims of unlawful segregation, who have benefited by prevailing on this claim originally alleged in their complaint and subsequently made by the KCMSD in its crossclaim against the State of Missouri. Moreover, the Court finds that the same remedial plans would have been ordered, and thus the KCMSD would have received the same benefits, even if it had not reiterated the plaintiffs' allegation in its crossclaim.

In addition, KCMSD in its crossclaim charges that the State should be required to contribute financially to any remedial plan the Court might order as relief against the KCMSD. The KCMSD was adjudged liable for adopting ineffective policies

to change the segregative patterns and was subsequently directed to fund approximately 20% of the initial remedy ordered by the Court. Jenkins v. State of Missouri, 639 F.Supp. 19 (W.D. Mo. 1986). However, on appeal, the Eighth Circuit held that the desegregation costs ordered by this Court should be divided equally between the KCMSD and the State of Missouri because both were adjudged constitutional violators. Jenkins v. State of Missouri, 807 F.2d 657, 684-85 (8th Cir. 1988).

Finally, the KCMSD alleges in its crossclaim, as did the plaintiffs in their complaint, that the State is liable for interdistrict violations. It is undisputed that the KCMSD and the plaintiffs failed in their attempt to prove an interdistrict liability against the State of Missouri.

Therefore, after a cross examination of the KCMSD's crossclaim against the State of Missouri defendants, the Court finds that the KCMSD, as a practical matter, is not a "prevailing party" within the meaning of 42 U.S.C. § 1988.

Notwithstanding the foregoing analysis, there exists a separate and compelling reason why the KCMSD should not be awarded attorney's fees and expenses in this case. In Jenkins v. State of Missouri, 593 F.Supp. 1485 (W.D. Mo. 1984), this Court found that the KCMSD had violated the United States Constitution by adopting policies which perpetuated, rather than eliminated, segregation in its schools. Therefore, the Court finds it inappropriate to award attorney's fees to a constitutional violator.

Accordingly, the KCMSD's motion for an award of attorney's fees and expenses will be denied.

AFT 691

Intervenor Kansas City, Missouri Federation of Teachers Local 691 (AFT 691) requests an award of $62,169.37 for attorney's fees and expenses incurred through March 1, 1987. This determination lies within the sound discretion of this Court. Little Rock School District v. Pulaski County Special School District, 787 F.2d 372 (8th Cir. 1986).

As noted several times in this opinion, a party may be considered a prevailing party under 42 U.S.C. § 1988 if it succeeds on any significant issue in the litigation which achieved some of the benefits the party sought in bringing

suit. Hensley v. Eckerhart, 461 U.S. at 433. AFT 691 was granted leave to intervene in this case on November 5, 1985, following the Court's liability order of September 17, 1984. AFT 691 had sought leave to intervene to protect the interest of its members and to assist the Court in fashioning a remedy to further integration. Notwithstanding, AFT 691's participation in this litigation has been de minimis. As other courts have recognized, this Court finds that an intervenor should not be awarded attorney's fees unless it has played a significant role in the litigation. Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir. 1985), cert. denied, 106 S.Ct. 85 (1985).

Accordingly, AFT 691's application for attorney's fees and expenses will be

denied.

LIABILITY FOR THE FEES AND EXPENSES AWARDED

For the reasons set forth in this opinion, the Court will award the plaintiffs approximately $4 Million in attorney's fees and expenses for work performed in this case. The remaining question before the Court is against whom will these fees be charged.

Plaintiffs succeeded on their liability claim against the State of Missouri defendants in this case. Jenkins v. State of Missouri, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984). This Court found the State of Missouri to be the primary constitutional violator because it had mandated separate schools for black and white children prior to 1954, and after 1954 had failed to take any affirmative

action to eliminate the vestiges and devastating effects of the dual school system it had created. Jenkins v. State of Missouri, 593 F.Supp. at 1505-06. Accordingly, the Court finds that the State of Missouri defendants are liable for the attorney's fees and expenses to be awarded plaintiffs' counsel in this case.

This Court also found in favor of the plaintiffs in their claim against the KCMSD. Jenkins v. State of Missouri, 593 F.Supp. at 1505. However, the Court did not find that the KCMSD caused the unlawful segregation within its district, but rather that it failed to fulfill its constitutional obligation to act to disestablish the dual school system created by the State of Missouri. Jenkins v. State of Missouri, 593 F.Supp. at 1504.

This Court found that the KCMSD had adopted policies which were ineffective in eliminating the unlawful segregation. Id.

Despite the adjudged constitutional violations of the KCMSD, the Court finds that the KCMSD is not chargeable for the attorney's fees and expenses to be awarded by the Court. The KCMSD, originally a plaintiff in this action, was involuntarily made a defendant by the Court in 1978. School District of Kansas City, Missouri v. State of Missouri, 460 F.Supp. 421, 445 (W.D. Mo. 1978). After 1978, the KCMSD and the plaintiffs cooperated closely in the development and prosecution of the litigation and the KCMSD actually acknowledged prior to trial that it had violated the constitutional rights of the plaintiffs.

In addition, the Court notes that in May, 1980 the State of Missouri defendants were adjudged "primary constitutional violators" in the St. Louis school desegregation case on facts very similar to those in the present case. Liddell v. Board of Education of the City of St. Louis, Missouri, 491 F.Supp. 351, 359 (E.D. Mo. 1980), aff'd, 667 F.2d 643 (8th Cir. 1981). Despite this finding, the State of Missouri defendants persisted in denying liability during the 10-1/2 month trial in this case on the liability issues.

For the reasons stated, the Court will order that the State of Missouri defendants are solely liable for the $4,053,015.66 in fees and expenses to be awarded the plaintiffs in this case.

Accordingly, it is hereby

ORDERED that the Court awards Mr. Benson $1,614,437.43 in fees and expenses for services rendered by him and his staff from 1979 through June 30, 1986; and it is further

ORDERED that the Court awards Mr. Benson $72,702.49 in fees and expenses incurred in litigating his fee application; and it is further

ORDERED that because Mr. Benson has previously received $347,332.93 of this award, the balance due Mr. Benson is $1,339,806.99; and it is further

ORDERED that the Court awards the LDF $2,323,730.60 in fees and expenses for services rendered through May of 1985; and it is further

ORDERED that the Court awards the LDF $42,145.14 for fees and expenses incurred

in litigating its fee application; and it is further

ORDERED that the State of Missouri defendants are solely liable for the $4,053,015.88 in fees and expenses awarded by the Court, including the $347,332.93 the State has previously paid Mr. Benson; and it is further

ORDERED that the KCMSD's motion for an award of attorney's fees and expenses is denied; and it is further

ORDERED that AFT 691's motion for an award of attorney's fees and expenses is denied.

RUSSELL G. CLARK, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Dated: May 11, 1987

SUMMARY OF FEES/EXPENSES AWARDED

Benson and Staff

1.

Attorneys	Hours	Hrly Rate	Award
Benson	5,020.8	200	1,004,160.00
Burkdoll	1,996.0	80	159,680.00
Goering	1,808.35	80	144,668.00
Routman	23.0	90	2,070.00
Thomas	65.8	85	5,593.00

2.

Paralegals/Law Clerks			
Johnson	3,860.1	40	154,404.00
Harrison	236.0	40	9,440.00
Zinn	1,058.3	40	42,332.00
Chavez	21.5	40	860.00
Fitzpatrick	95.4	40	3,816.00
Borge	96.9	40	3,876.00
Pugh	210.0	40	8,400.00

DeSimone	24.8	35	868.00
Mansour	19.3	35	675.00
Donohoe	10.3	35	360.50
Petren	1.5	35	52.50

3.

Expenses 73,182.43

Subtotal 1,614,437.43

4.

Fees/Expenses in Litigation of Fee Application

a. Attorneys

Lovell	379.1	125	47,387.50
Benson	81.0	125	10,125.00

b. Paralegals/Law Clerks

Pugh	40.0	40	1,600.00
Cole	21.5	40	860.00
Pence	38.0	40	1,520.00
Apple	66.0	35	2,310.00

Krulewitch	45.0	35	1,575.00
c. Expenses			7,324.99
		Subtotal	72,702.49
		Total Award	1,687,139.92
Less Amount previously paid to Benson			347,332.93
Balance of Award due Benson			1,339,806.99

LDF

	Hours	Hrly Rate	Award
1. Attorneys			
Liebman	4,066.8	160	650,688.00
Shaw	2,522.5	95	239,637.50
Lief	699.7	175	122,447.50
Fins	1,299.7	95	123,471.50
Johnston	354.3	175	62,002.50
Hair	30.5	95	2,897.50
Winter	195.9	95	18,610.50
2. Paralegals	3,254.6	40	130,184.00
3. Law Clerks	5,717.85	35	200,124.75
4. Recent Law Graduates	2,020.58	50	101,029.00
5. Expenses			672,837.85
		Subtotal	2,323,730.60
6. Fee/Expenses in Litigating Fee Application			
a. Attorneys			
Liebman	42.5	125	5,312.50
Ralston	158.1	125	19,762.50
Topkis	21.8	125	2,725.00
Chambers	10.0	125	1,250.00
b. Expenses			13,095.14
	Subtotal		42,145.14
	Total Award		2,365,875.74

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KALIMA JENKINS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 77-0420-CV
	)	W-4
STATE OF MISSOURI, et al.	)	
	)	
Defendants.	)	

ORDER

Several motions are presently before this Court. Plaintiffs have moved the Court to amend its order of May 11, 1987 that awarded attorney's fees to plaintiffs' counsel. This motion will be granted in part and denied in part. Plaintiffs also moved the Court to amend the long-range magnet school order of November 11, 1986 to add the extended day program to the two environmental science

elementary magnet programs at North Rock Creek and Korte Schools. This motion will be granted. Finally, the State of Missouri has moved the Court to strike KCMSD's Suggested Findings and Conclusions regarding the year 3 desegregation budget. This motion will be denied.

Motion to Amend Attorney's Fees Order

Plaintiffs moved the Court to amend its May 11, 1987 attorney's fees order to award Mr. Benson and his staff additional fees and expenses for their services rendered in monitoring the remedial programs from June 14, 1985 through June 14, 1986. Mr. Benson had requested $42,090.45 for these services on July 1, 1986 but had failed to include this request in his summary of fees requested that he filed with the Court on March 13, 1987. In the

present motion, Benson has increased his request for these monitoring services to $52,781.45.

This Court previously found that the hourly rates for the Kansas City, Missouri attorneys with litigation experience and expertise comparable to that of Mr. Benson range from $125 to $175 per hour. See May 11, 1987 order at p. 4. The Court also found that Mr. Benson's rate would fall at the higher end of this range based upon his expertise in the area of civil rights. Id. After considering the twelve factors enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1984), and the additional factor of delay in payment, the Court concluded that a reasonable hourly rate for Mr. Benson's services was $200.00. However, this fee

was for Mr. Benson's services in litigating the lawsuit, not for his time expended in monitoring the implementation of the remedial plan ordered by the Court. The Court finds that time spent in monitoring the remedial plan should be charged at a substantially lower rate, and recently applied this approach in G.L., an infant, by and through his Next Friend, et al., v. Zumwalt, et al., Case No. 77-0242-CV-W-4, March 27, 1987. Therefore, the Court finds that the $125.00 hourly rate originally requested by Mr. Benson for these services is reasonable. Furthermore, the Court finds that $40.00 per hour for paralegals and $35.00 per hour for law clerks are reasonable rates for these services in the Kansas City area. The Court also finds that the hours

submitted by Benson and his staff represent the time reasonably expended in monitoring and implementing the remedial plan in year 1985-86. The number of hours, multiplied by the rates found to be reasonable by the Court, results in an additional fee award of $37,950.00.

In addition, Mr. Benson requests $3,478.00 in expenses incurred in monitoring the remedial plan in 1985-86. Having reviewed the records submitted, the Court finds that expenditures were necessary and their costs reasonable and awards the amount requested.

Accordingly, the Court awards Mr. Benson and his staff an additional $42,090.45 in fees and expenses incurred in monitoring and implementing the remedial plan in 1985-86. Furthermore,

for the reasons set forth in the Court's order of May 11, 1987, the State of Missouri defendants are solely liable for these additional fees and expenses awarded to Mr. Benson and his staff.

The plaintiffs also moved the Court to amend its findings with regard to the number of hours voluntarily excluded by Benson and his staff from their fee applications pursuant to Hensley v. Eckerhart, 461 U.S. 424 (1983). After re-examining the applications submitted by Mr. Benson, the Court finds that it failed to recognize in its May 11, 1985 order the initial reductions made by Mr. Benson and his staff. With these additional reductions, the total number of hours excluded by Benson and his staff approximate 4,490 hours and the Court modifies its previous

order to reflect this amount. However, this amendment does not affect the Court's previous award of attorney's fees because that award was based solely on the remaining hours for which Benson and his staff requested compensation, hours that the Court found were either related solely to the successful claims made by the plaintiffs against the State and the KCMSD, or were so closely interrelated among the remaining claims that they could not be separated.

Plaintiffs also moved the Court to increase their attorney's fees award to reflect the risk of nonpayment in this case. As previously found by this Court, the plaintiffs' likelihood of success in their claim against the State of Missouri was very high and thus Benson's risk of

nonpayment very slight, because of the State's discriminatory actions. This small risk of nonpayment was fully reflected in the reasonable attorney's fees awarded plaintiffs' counsel and therefore the Court denies Mr. Benson's request to increase his award.

Plaintiffs also moved the Court to amend its findings as to the total amount of fees and expenses sought by Mr. Benson and his staff to reflect the $347,332.93 previously paid to Mr. Benson by the State and the $42,090.45 in fees and expenses for services rendered in monitoring the remedial plan in 1985-86. In its order of May 11, 1987, the Court stated that Benson "has moved for $3,310,587.00 in fees and expenses for services rendered by him and his staff

through June 30, 1986." This amount simply represented the alleged balance due of the total fee award Mr. Benson was requesting. For clarification, the Court modifies the second sentence of its May 11, 1987 order to read:

> Plaintiffs co-counsel, Arthur Benson, has moved for a total of $3,700,010.30 in fees and expenses for services rendered by him and his staff through June 30, 1986.

The above modification has no effect on the amount of fees and expenses awarded by the Court.

Long-Range Magnet School Order

Plaintiffs have moved the Court to amend its long range magnet school order of November 12, 1986 to add the extended day program to the two environmental science elementary magnet programs at

North Rock Creek and Korte Schools. This proposal was approved by the Desegregation Monitoring Committee on May 5, 1987 and was agreed upon by all parties at the May 11-12 hearing on the 1987-88 desegregation budget. Accordingly, plaintiffs' motion will be granted and the long-range magnet school order of November 12, 1986 will be modified as requested.

Motion to Strike

On June 15, 1986, the KCMSD filed Suggested Findings and Conclusions relating to the 1987-88 desegregation budget. Subsequently, the State of Missouri moved to strike that pleading claiming it was not permitted by any filing schedule issued by the Court and

because the State did not have adequate time to fully respond to KCMSD's suggestions.

Rule 12(f), Fed.R.Civ.P., permits a Court to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Generally, motions to strike are disfavored and in the instant case the State's motion is improper as there is no claim that anything in KCMSD's pleading is redundant, immaterial, impertinent or scandalous. However, the Court acknowledges that the State may not have had sufficient time to respond to KCMSD's suggestions and therefore did not consider either KCMSD's suggested findings or the State's brief response in ruling on the year three desegregation budget.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion to amend the Court's order of May 11, 1987 regarding attorney's fees is granted in part and denied in part as set forth in this order; and it is further

ORDERED that the Court modifies the long-range magnet order of November 12, 1986 to include the extended day program at North Rock Creek and Korte Elementary Schools; and it is further

ORDERED that the State of Missouri's motion to strike KCMSD's Suggested Findings and Conclusions relating to the 1987-88 desegregation budget is denied.

RUSSELL G. CLARK, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Dated: July 14, 1987